Office-Supreme Court, U.S.
FILED
JUN 3 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1622

In the Supreme Court of the United States

OCTOBER TERM, 1980

ALEX R. GROTE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Faretta v. *California*, 422 U.S. 806 3

Frisbie v. *Collins*, 342 U.S. 519 4

Gerstein v. *Pugh*, 420 U.S. 103 4

Haines v. *Kerner*, 404 U.S. 519 3

United States v. *Anderson*, 577 F. 2d 258 3

United States v. *Blackwood*, 582 F. 2d 1244 3

United States v. *Crews*, 445 U.S. 463 4

United States v. *Kahl*, 583 F. 2d 1351 3

Statute and rules:

26 U.S.C. 7203 1

Fed. R. Crim. P. :

Rule 9(a) 1, 4

Rule 12(b)(1) 3

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1622

ALEX R. GROTE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that his conviction for failing to file income tax returns should be overturned on the ground that the trial court's jurisdiction over his person rested on a warrant issued pursuant to an unsworn information, in violation of Fed. R. Crim. P. 9(a).

The pertinent facts may be summarized as follows. On January 5, 1979, the United States Attorney for the Western District of Texas filed an unsworn information charging petitioner with failing to file income tax returns for the years 1975 and 1976, in violation of 26 U.S.C. 7203 (1 R. 1; Pet. App. 18). Petitioner was arraigned on January 19, 1979, before the United States District Court for the Western District of Texas. At the outset of the arraignment, petitioner, appearing without counsel, objected that the

court lacked jurisdiction (III R. 2). The court overruled the objection, appointed counsel, and ordered a recess so that petitioner could discuss the charges against him with counsel (III R. 2-4).

Following the recess, counsel advised the court that petitioner "has some disagreement about * * * the jurisdiction of the Court in this case" and accordingly requested that a plea of not guilty be entered (III R. 5). Petitioner added that he wished to "enter a plea of lack of jurisdiction" (III R. 6). The court then invited petitioner to file a written challenge to its jurisdiction and entered a plea of not guilty (*ibid.*). Subsequently, counsel filed two motions to dismiss for lack of jurisdiction, one before trial and one on the day of trial (I R. 10, 22). Neither motion questioned the court's jurisdiction over petitioner's person; rather, each objected to the court's subject-matter jurisdiction (Pet. App. 19-20).[1]

Petitioner was tried and convicted by a jury on April 9-10, 1979. On August 31, 1979, petitioner filed in the district court a motion to set aside the verdict, and on September 24, 1979, filed a petition for a writ of habeas corpus. These pleadings set forth, for the first time, petitioner's objection to the court's personal jurisdiction on the ground that the warrant that brought him before the court rested on a defective information. The motions were denied on September 11 and November 1, 1979, respectively, because petitioner's appeal to the Fifth Circuit (filed on May 11, 1979) had removed the district court's jurisdiction.

---

[1]The first motion asserted that the court lacked jurisdiction because an unrelated suit had been dismissed. The second contended that "[t]he Court, under the rules of 'Criminal Procedure,' lacks jurisdiction to hear civil law in a criminal action" (I R. 22). In addition, petitioner moved to quash the complaint and information on the ground that the prosecution should have been initiated by presentment to a grand jury.

On appeal, the Fifth Circuit held that petitioner had waived his objection to personal jurisdiction because neither he nor his counsel specifically objected on this ground or called the court's attention to the defective warrant (Pet. App. 19-20).

1. The court of appeals correctly concluded that petitioner waived his right to object to the court's jurisdiction over his person. Fed. R. Crim. P. 12(b)(1) requires a defendant to raise "[d]efenses and objections based on defects in the institution of the prosecution" prior to trial. *United States* v. *Kahl*, 583 F. 2d 1351, 1356 (5th Cir. 1978). Neither petitioner nor his counsel, despite repeated opportunities to do so, complained of the defective warrant until after trial and sentencing.[2]

Petitioner nevertheless cites *Faretta* v. *California*, 422 U.S. 806 (1975), and *Haines* v. *Kerner*, 404 U.S. 519 (1972), for the proposition that his general objection to the court's jurisdiction, voiced at the arraignment and before counsel was appointed, should be liberally and broadly interpreted as preserving his objection to personal jurisdiction because he was, at that point, appearing *pro se* (Pet. 11-12). This argument fails for two reasons. First, a defendant who chooses to represent himself must abide by the consequences of his decision, including his possible ignorance of procedural or substantive technicalities. *Faretta* v. *California*, *supra*, 422 U.S. at 835; *United States* v. *Anderson*, 577 F. 2d 258, 261 (5th Cir. 1978); *United States* v. *Blackwood*, 582 F. 2d 1244, 1246 (10th Cir. 1978). Second, petitioner in fact was represented by counsel throughout virtually the entire pretrial period, and certainly in time to raise the personal jurisdiction objection with the necessary specificity and timeliness.

---

[2]See note 1, *supra*, and accompanying text.

2. At all events, the relief petitioner seeks is unwarranted. Even assuming, *arguendo*, that petitioner preserved his objection to personal jurisdiction because of the concededly defective information and warrant issued pursuant thereto, his conviction supplied whatever indicia of probable cause may have been lacking in the warrant. Accordingly, as this Court has often held, the conviction is valid even if the arrest was not. *United States* v. *Crews*, 445 U.S. 463, 474 (1980); *Gerstein* v. *Pugh*, 420 U.S. 103, 119 (1975); *Frisbie* v. *Collins*, 342 U.S. 519, 522 (1952). At most, therefore, petitioner's claim is that he was illegally arrested because the warrant was issued in violation of Rule 9(a). Since no evidence resulting from this arrest was introduced against him at trial, he would be entitled to no relief even if he had not waived his objection.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JUNE 1981

DOJ-1981-06